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April 14, 2006

**BY HAND DELIVERY**

Mr. Lawrence H. Norton  
Office of the General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

**Re: MUR 5718**

Dear Mr. Norton:

On behalf of Senator Barack Obama, this letter is submitted in response to the complaint filed by the Illinois Republican Party (the "Complaint") and subsequently labeled MUR 5718.

The Commission may find "reason to believe" only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation. *See* 11 C.F.R. §§ 111.4(a), (d) (2004). Unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true, and provide no independent basis for investigation. *See* Commissioners Mason, Sandstrom, Smith and Thomas, Statement of Reasons, MUR 4960 (Dec. 21, 2001). This frivolous Complaint is simply a ploy by the Illinois Republican Party to misconstrue campaign finance law for partisan gain, and should be dismissed immediately.

The Illinois Republican Party alleges that in light of federal laws restricting electioneering and coordinated communications, there is something "legally troubling" about including an endorsement from Senator Obama, a candidate for the 2010 U.S. Senate race, in a radio advertisement (the "Radio Endorsement") paid for by the principal campaign committee of Alexander Giannoulis, a Democratic candidate for Illinois State Treasurer in 2006. Complaint at 2. The Illinois Republican Party

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suggests that "perhaps" because of Senator Obama's role in the Radio Endorsement, it constitutes a coordinated expenditure and an in-kind contribution to Senator Obama's 2010 campaign. *Id.* These allegations are entirely without merit. Senator Obama's words of support for Alexi Giannoulias in the Radio Endorsement comply with the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations. Specifically, the reference to Senator Obama and his endorsement of Alexi Giannoulias contained in the Radio Endorsement do not fall within the definition of "electioneering communication" or "coordinated communication" under the Act or Commission regulations.

The Act identifies three categories of spending which, when coordinated with a federal candidate, must be treated as an in-kind contribution to that federal candidate. First, "expenditures made by any person in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents" constitute a contribution to the candidate. 2 U.S.C. § 441a(a)(7)(B)(i). To qualify as an "expenditure", spending must be undertaken "for the purpose of influencing" a federal election. *See* 2 U.S.C. § 431(9)(A). Second, the financing of "the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents" also constitutes an "expenditure" and an in-kind contribution. 2 U.S.C. § 441a(a)(7)(B)(iii). Third, any disbursement for an electioneering communication that is coordinated with a candidate, a candidate's authorized committee, or their agents must be treated as a contribution to the candidate. *See* 2 U.S.C. §§ 434(f), 441a(a)(7)(C).

The Commission's "coordinated communication" regulations implement these statutory provisions by setting forth a three-prong test for determining whether a communication constitutes an in-kind contribution to a federal candidate. The first prong requires that the communication be paid for by a person other than the candidate, the candidate's authorized committee or any of their agents. *See* 11 C.F.R. § 109.21(a)(1). Next, the communication must include content that satisfies at least one of the Commission's four "content standards." *See* 11 C.F.R. § 109.21(a)(2) and (c). Finally, the candidate and the person paying for the communication must satisfy at least one of the Commission's six "conduct standards." *See* 11 C.F.R. § 109.21(a)(3) and (d)(1) through (6). A communication must satisfy all three prongs – payment, content and conduct – in order to be deemed a "coordinated communication" that must be treated as an in-kind contribution to a federal candidate. *See* 11 C.F.R. § 109.21(a) and (b). Senator Obama's participation in the Radio Endorsement fails to

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satisfy any of the content standards for a coordinated communication, and therefore there is no basis for concluding that the Radio Endorsement constitutes an in-kind contribution to Senator Obama's 2010 campaign.

(1) The first content standard implements the statutory requirement that any disbursement for an electioneering communication that is coordinated with a candidate, a candidate's authorized committee, or their agents be treated as a contribution to the candidate. *See* 2 U.S.C. §§ 434(f), 441a(a)(7)(C). In order to constitute an "electioneering communication," a communication must refer to a clearly identified federal candidate; it must be "aired, broadcast, cablecast or otherwise disseminated through the facilities of a television station, radio station, cable television system, or satellite system;" and it must be disseminated within 60 days before a general, special or runoff election for the office sought by the candidate referenced in the communication, or within 30 days before a primary, preference, special or runoff election, or a caucus or convention, in which the candidate referenced is seeking the nomination of that political party. *See* 11 C.F.R. § 100.29(a)(1)-(3). In addition, in the case of a candidate for the U.S. Senate, the communication must be targeted to the relevant electorate. *See* 11 C.F.R. 100.29(a)(3) and (b)(5)(ii).

The definition of "electioneering communication" explicitly excludes any communication that "[i]s not described in 2 U.S.C. 431(20)(A)(iii) and is paid for by a candidate for State or local office in connection with an election to State or local office." 11 C.F.R. § 100.29(c)(5). 2 U.S.C. § 431(20)(A)(iii) in turn encompasses any "public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)."

Senator Obama's inclusion in the Radio Endorsement does not meet the definition of "electioneering communication" for several reasons. The Radio Endorsement squarely falls within the exemption from the definition of "electioneering communication" for state and local candidates, set forth in 11 C.F.R. § 100.29(c)(5). It was "paid for by a candidate for State or local office in connection with an election to State or local office" and, as is evident from the script of the Radio Endorsement, it does not "promote or support" Senator Obama's candidacy for U.S. Senate. Other than identifying Senator Obama by name, the Radio Endorsement is not in any way

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focused on Senator Obama; his words of support are to promote the candidacy of Alexi Giannoulias.

Even if the exemption for state and local candidates were not applicable to the Radio Endorsement, the ad's reference to Senator Obama does not satisfy the definition of "electioneering communication." The primary election and general election for Senator Obama's re-election to the U.S. Senate will take place in 2010. Because the Radio Endorsement will not be disseminated within 60 days before a general election for the office sought by Senator Obama, or within 30 days before a primary in which Senator Obama is seeking the nomination of his party, the reference to Senator Obama in the Radio Endorsement does not satisfy either the 30- or 60- day requirement for a radio advertisement to be considered an electioneering communication. *See* 11 C.F.R. § 100.29(a)(2).

(2) The second content standard implements the statutory requirements for republished campaign materials. 2 U.S.C. §441a(a)(7)(B)(iii); 11 C.F.R. § 109.219(c)(2). The Radio Endorsement contains no campaign materials of a federal candidate and therefore does not satisfy this standard.

(3) The third content standard implements the statutory requirements for coordinated "expenditures." *See* 2 U.S.C. § 441a(a)(7)(B)(i). As noted earlier, the Act requires that an "expenditure" be for the purpose of influencing a federal election. *See* 2 U.S.C. § 431(9)(A). A public communication "that expressly advocates the election or defeat of a clearly identified candidate for Federal office" meets this standard. 11 C.F.R. § 109.21(c)(3); *see Buckley v. Valeo*, 424 U.S. 1, 80 (1976). The Radio Endorsement does not expressly advocate the election of any federal candidate, and therefore does not trigger this third content standard.

(4) The fourth content standard, also a measure to implement the statutory "for the purpose of influencing any election for Federal office" standard, is defined as a public communication about which each of the following statements is true:

- (i) The communication refers to a political party or to a clearly identified candidate for Federal office;
- (ii) The public communication is publicly distributed or otherwise publicly disseminated 120 days or fewer before a general, special or runoff election, or 120 days or fewer before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate; and

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(iii) The public communication is directed to voters in the jurisdiction of the clearly identified candidate or to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot. 11 C.F.R. § 109.21(c)(4).

Although it is possible to read section 109.21(c)(4)(ii) as restricting references to Senate candidates within six different 120-day periods per Senate election cycle, the Commission has clarified that the 120-day rule is triggered "only by a communication run within 120 days of the election of the referenced candidate." *See* Advisory Opinion 2005-18, Concurring Opinion of Commissioners Mason, McDonald, Thomas, Toner, and Weintraub. Because Senator Obama's next primary and general elections will not occur until 2010, the 120-day periods applicable to Senator Obama will not begin for another four years. There is no reasonable basis for concluding that the reference to Senator Obama in the Radio Endorsement satisfies the requirements of section 109.21(c)(4), or is even remotely for the purpose of influencing any federal election. *See* 2 U.S.C. § 441a(7)(B).

In sum, Senator Obama's endorsement of Alexi Giannoulias in the Radio Endorsement complied with the Act and Commission regulations. The Complaint is baseless and should be dismissed immediately.

Very truly yours,



Marc E. Elias

Caroline P. Goodson

Counsel to Senator Barack Obama

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